

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL  
COALITION, WEST VIRGINIA  
HIGHLANDS CONSERVANCY, and  
SIERRA CLUB,**

**Plaintiffs,**

**v.**

**CIVIL ACTION NO. 3:12-cv-0785**

**ELK RUN COAL COMPANY, INC.,  
and ALEX ENERGY, INC.,**

**Defendants.**

**CONSENT DECREE**

**I. RECITALS**

1. On March 20, 2012, Plaintiffs Ohio Valley Environmental Coalition, Inc., West Virginia Highlands Conservancy, Inc., and Sierra Club (collectively “Plaintiffs”) filed a Complaint for Declaratory and Injunctive Relief and for Civil Penalties (“Complaint”) in this civil action against Defendants Elk Run Coal Company, Inc., and Alex Energy, Inc. (“Defendants”). ECF No. 1.

2. The Complaint alleged that Defendants are discharging concentrations of pollutants in violation of West Virginia’s narrative water quality standards for biological stream protection and that these standards are incorporated into West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit Nos. WV1003968, WV1013441, WV1015362, WV1012401, and WV1019601 issued to Defendants by the West Virginia Department of Environmental Protection (“WVDEP”) pursuant to Section 402 of the federal Clean Water Act (“CWA”) and the West Virginia Water Pollution Control Act. The Complaint further

alleged that Defendants' violations of West Virginia's narrative water quality standards constituted a violation of the performance standards under the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA") and the terms and conditions of its West Virginia Surface Mining Permits S5075-86, S5057-92, S3013-91, S3005-98, and S3007-92.

3. On July 13, 2012, the Court bifurcated this case into two phases: (1) jurisdiction and liability; and (2) civil penalties and injunctive relief. ECF No. 16. Trial was held on the jurisdiction and liability phase from December 3, 2013 to December 4, 2013.

4. On June 4, 2014, the Court issued a Memorandum Order and Opinion regarding the jurisdiction and liability phase. ECF No. 110. The Court found that Plaintiffs established, by a preponderance of the evidence, that Defendants committed at least one violation of their permits by discharging into Laurel Creek and Robinson Fork high levels of ionic pollution, which have caused or materially contributed to a significant adverse impact to the chemical and biological components of the applicable stream's aquatic ecosystem, in violation of the narrative water quality standards that are incorporated into Defendants' permits. ECF No. 110.

5. The Parties recognize, and the Court by entering this Consent Decree finds, that the Consent Decree has been negotiated by the Parties in good faith and will avoid further litigation among the Parties, and that this Decree is fair, reasonable and in the public interest.

NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

## **II. JURISDICTION AND VENUE**

6. For purposes of this Consent Decree, the Parties agree that this Court has jurisdiction over the Parties and over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 33 U.S.C. § 1365 (CWA citizen suit provision) and 30 U.S.C. § 1270 (SMCRA citizen suit provision).

7. Venue is proper in the Southern District of West Virginia, pursuant to 28 U.S.C. § 1391(b) and (c), because it is the judicial district in which Defendants are located, reside and/or do business, and/or in which the violations alleged in the Complaint occurred, as well as 33 U.S.C. § 1365(c)(1), because the sources of the alleged CWA violations are located in this judicial district, and 30 U.S.C. § 1270(c), because the coal mining operations complained of are located in this judicial district.

8. For purposes of this Consent Decree, or any action to enforce this Consent Decree, Defendants consent to this Court's jurisdiction over this Consent Decree and consent to venue in this judicial district.

### **III. APPLICABILITY**

9. The provisions of this Consent Decree apply to and are binding upon Plaintiffs and those with authority to act on their behalf, including, but not limited to, their officers, directors, and staff; upon Defendants and any of their respective successors and/or assigns; and upon other persons or entities otherwise bound by the law.

### **IV. DEFINITIONS**

10. Terms used in this Consent Decree that are defined in the CWA, SMCRA or in regulations issued pursuant thereto shall have the meanings assigned to them therein, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Complaint" shall mean the Complaint for Declaratory and Injunctive Relief filed by Plaintiffs in this action on March 20, 2012;

b. "Consent Decree" or "Decree" shall mean this Consent Decree and any appendices attached hereto;

c. "CWA" shall mean the federal Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*;

d. “Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the next business day except for purposes of calculating periods of compliance under Section VII of this Decree;

e. “Defendants” shall mean Elk Run Coal Company, Inc. and Alex Energy, Inc.;

f. “Listed Technology” is Reverse Osmosis or another technology for removing constituents from effluent to levels required to comply with this Consent Decree that is added to the list of technologies pursuant to Section VII of the Decree;

g. “Effective Date” shall have the definition provided in Section XIV (“Effective Date”);

h. “Outfall” or “Outlet” shall mean the following WV/NPDES-permitted discharge points: WV1003968 Outfalls 001, 002, 003, 004, and 017; WV1013441 Outfalls 001, 002, 003, 004, 005, 006, 007, and 019; WV1015362 Outfalls 001, 002, and 003; and WV1012401 Outfalls 004 and 007;

i. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral;

j. “Parties” shall mean Plaintiffs and Defendants;

k. “Passing GLIMPSS Score” shall mean scores above the range for a “degraded stream” as defined in Pond et al, “Calibration and validation of a regionally and seasonally stratified macroinvertebrate index for West Virginia Wadeable Streams,” Environmental Monitoring and Assessment (2013). This corresponds to a score of 53 in the

months of March through May and 55 in the months of June through October as calculated in the above-referenced article;

l. “Permits” shall mean WV/NPDES Permit Nos. WV1003968, WV1013441, WV1015362, and WV1012401;

m. “Plaintiffs” shall mean Ohio Valley Environmental Coalition, Inc., West Virginia Highlands Conservancy, Inc., and Sierra Club;

n. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral;

o. “SMCRA” shall mean the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq.*;

p. “USEPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

q. “WVDEP” shall mean the West Virginia Department of Environmental Protection; and

r. “WV/NPDES permit” shall mean a West Virginia / National Pollutant Discharge Elimination System permit issued by WVDEP pursuant to Section 402 of the CWA.

## **VI. COMPLIANCE REQUIREMENTS**

11. Plaintiffs shall not seek any remedies or penalties under the CWA or SMCRA for violations of WV/NPDES permit effluent limits or narrative water quality standards associated with discharges of sulfates, TDS, ionic pollution, or elevated

conductivity at the affected Outfalls so long as this Decree is in effect, other than those remedies and penalties set forth herein.

12. Where any compliance obligation under this Section requires Defendants to obtain a federal, state or local permit or approval, Defendants shall submit timely and substantially complete applications and take all other actions necessary to obtain all such permits or approvals. Defendants may seek relief under the provisions of Section IX of this Consent Decree (“Force Majeure”) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendants have submitted timely and substantially complete applications and have taken all other actions necessary to obtain all such permits or approvals.

13. Compliance alternatives: Defendants shall achieve compliance with the requirements of this Consent Decree at all Outfalls by August 1, 2019. Compliance may be achieved for individual Outfalls and such Outfalls shall be released from coverage under this Consent Decree prior to the termination of this Consent Decree. Defendants shall notify Plaintiffs in writing within thirty (30) days of the end of the calendar month in which compliance was demonstrated, identifying the Outfall(s) at which compliance was achieved. Defendants may demonstrate compliance at an Outfall in one of two ways:

a. First alternative: By employing measures to achieve a Passing GLIMPSS Score in a receiving stream for an Outfall by August 1, 2019. Provided, however, if Defendants undertake to achieve a Passing GLIMPSS Score by some means other than reducing conductivity to 300  $\mu$ S/cm and do not achieve a Passing GLIMPSS Score by February 1, 2018, or earlier if such earlier date is necessary to allow Defendants

sufficient time to fully implement their Proposed Treatment Strategy, then Defendants must begin construction immediately of a system capable of complying with the alternative described in Paragraph 13.b. below at or immediately downstream of an Outfall so compliance is achieved by August 1, 2019. Choosing compliance with the “first alternative” does not relieve Defendants from the milestones listed in Paragraph 14, until all conditions of this paragraph are met.

The Passing GLIMPSS Score should be assessed at a sampling point on Laurel Creek (38.046556N, 81.71W) and the mouth of Robinson Fork (38.32537N, 81.01887W).

Defendants must notify Plaintiffs whenever they intend to conduct sampling that may be used to derive a GLIMPSS score. Plaintiffs shall have the right to observe such sampling and contemporaneously collect samples to verify that Defendants’ methods and analyses are appropriate. Sampling will only result in a Passing GLIMPSS Score if Defendants’ samples meet the criteria defined in Paragraph 10.k., *supra*. Provided, that if Plaintiffs’ take a verification sample and the GLIMPSS score of such sample is materially different than the GLIMPSS score reported by Defendants for the same sample, the parties shall meet and confer to determine the cause of such deviation. If the parties cannot resolve such discrepancy, then such dispute shall be referred to the Special Master pursuant to Paragraph 15, *infra*. In no event may Defendants or their agents introduce macroinvertebrates into streams that will be assessed for compliance under the “first alternative.” Upon achievement of two successive Passing GLIMPSS scores at the same location, with no failing scores in between, all outfalls on the respective stream will be considered in compliance. In the event Defendants believe an unusual natural event such as a flood or forest fire has adversely affected a GLIMPSS score such that a second

consecutive passing score is not achieved, Defendants may submit to Plaintiffs the results of any GLIMPSS samples taken contemporaneously with the sampling required by the Paragraph 13, in the same or adjacent watershed, and in compliance with the requirements of the Consent Decree in support of a request to have the affected sample disregarded for the purposes of determining compliance with this Consent Decree.

b. Second alternative: By constructing and operating a system designed to achieve a conductivity measurement at or below 300  $\mu\text{S}/\text{cm}$  at or immediately downstream of an Outfall by August 1, 2019; provided, however, that if WVDEP adopts a water quality standard for conductivity, and USEPA approves, then that standard shall be applicable instead of the 300  $\mu\text{S}/\text{cm}$  threshold negotiated by the Parties.

c. Provided that, if WVDEP adopts, and USEPA approves, a new stream condition index (“SCI”) to measure compliance with the narrative standard different from the GLIMPSS and that standard is applied to Defendants’ discharges through any reissuance or modification of their WV/NPDES permits after the completion of the United States Environmental Protection Agency’s review of such permit reissuance or modification then this Decree shall neither excuse nor prevent Defendants from using that standard as the measure of compliance with its Permits. Provided that, for the purposes of the Consent Decree, the West Virginia Stream Condition Index (“WVSCI”) developed by TetraTech in 2000, as amended, shall in no circumstances be used as a measure of compliance. Plaintiffs, however, reserve the right to appeal the reissued or modified permit(s). Upon conclusion of any such appeal, the permit limit incorporating the narrative standard shall become the measure of compliance for this Decree. Provided further that, a proposal to adopt a new SCI standard that has not been approved by or added through a



permit modification or reissuance shall not excuse Defendants from meeting any deadline for an applicable milestone listed in the compliance schedule in Paragraph 14.

14. Schedule of Compliance: Defendants shall comply with the following compliance schedule unless the Special Master determines that an interim milestone must be modified to achieve compliance by the Final Compliance Date:

SCHEDULE OF COMPLIANCE	
Milestone	Deadline
1. Complete Design Basis background development, including flow measurement and water quality analysis.	February 1, 2016
2. Complete evaluation of compliance alternatives and select Proposed Treatment Strategy.	May 1, 2016
3. Complete pilot testing, if required by Proposed Treatment Strategy, and begin preliminary engineering.	August 1, 2016
4. Complete preliminary engineering of Proposed Treatment Strategy	May 1, 2017
5. Complete detailed engineering of Proposed Treatment Strategy	October 1, 2017
6. Begin Construction of Proposed Treatment Strategy (if necessary).	February 1, 2018
7. Final Compliance Date.	August 1, 2019

Plaintiffs do not concede that Defendants' allotted time for compliance represents the appropriate compliance time to achieve similar compliance at other mines in other locations. Plaintiffs acknowledge, and the compliance schedule reflects, that Defendants are the first operators associated with surface mining in the Central Appalachian region to agree to comply with the provisions of Section VI of this Decree ("Compliance Requirements").

15. Special Master: Pursuant to Federal Rule of Civil Procedure 53(a)(1)(A), the Parties consent to the appointment of James H. Kyles as the Special Master

for this matter. The Special Master shall be retained within 30 days of the effective date of this Decree. Defendants will bear the costs and fees of the Special Master.

In the event Mr. Kyles declines to accept his appointment as Special Master or resigns from his duties under this Consent Decree after accepting his appointment, pursuant to Fed. R. Civ. P 53(b), the parties shall jointly submit the names of recommended Special Masters to the Court within thirty (30) days of Mr. Kyles providing notice that he will not accept appointment or tendering his resignation as Special Master and the Court shall issue an order appointing a Special Master in conformance with the terms of this Consent Decree.

In the event of a disagreement of the parties as to the selection of a Special Master, each side shall present to the other the names of up to three candidates. The opposing side would then select one candidate to be presented to the Court, resulting in two names presented to the Court without indication to the Court of which party prefers which candidate. The Court would then pick from the remaining two candidates or require the parties to submit additional names.

The Special Master's authority and responsibilities shall be limited to the areas specified in this Decree. The Special Master shall:

a. Determine whether Defendants' Proposed Treatment Strategy is consistent with customary engineering practices and principles pursuant to the provisions of Paragraph 16, below.

b. Review and comment upon Defendants' preliminary engineering plans. In conducting this review the Special Master shall, among other things, assess whether the plans are consistent with customary engineering practices and principles and

whether the preliminary engineering plans are consistent with the Defendants' Proposed Treatment Strategy and the schedule of compliance. If the Special Master believes that the scheduled start date for construction of the Proposed Treatment Strategy should be adjusted in light of the preliminary engineering plans, he shall propose a new recommended start date and the parties shall meet and confer to determine whether to adjust the schedule; provided, such new proposed start date shall not be moved sooner than November 1, 2017.

c. Review and approve Defendants' detailed engineering of the Proposed Treatment Strategy as well as the schedule or procurement of necessary equipment; provided that such approval shall assess whether such detailed engineering plans are consistent with customary engineering practices and principles and is not to be construed as guaranteeing that the Proposed Treatment Strategy will be successful. In conducting this review the Special Master shall, among other things, determine whether the detailed engineering plans are consistent with the Defendants' Proposed Treatment Strategy and the schedule of compliance. If, after receiving any comments from the parties, the Special Master believes that the scheduled start date for construction of the Proposed Treatment Strategy should be adjusted in light of the detailed engineering plans, he shall propose a new start date and the parties shall revise the schedule accordingly; provided, Defendants may appeal this decision to the Court.

d. Make determinations that a proposed technology should be a Listed Technology as set forth in Paragraph 30 of this decree;

e. Resolve disputes between Plaintiffs and Defendants with respect to the termination of the Consent Decree for a particular Outfall;

f. Resolve disputes between Plaintiffs and Defendants with respect to whether compliance with this Decree has been achieved;

g. Hold a conference call to discuss progress within thirty days of June 1, 2015, December 31, 2015 and June 1, 2016.

h. Review quarterly progress Reports from Defendants after August 1, 2016 and schedule any conference call to discuss the same;

i. Resolve any other specific dispute or issue regarding compliance with or request from relief from the terms of the Consent decree that, upon motion from a Party, the Court may refer to the Special Master;

j. Conduct site visits, as he deems appropriate to fulfill his duties as set forth in this Decree;

k. Schedule and conduct meetings between the Parties in connection with the fulfillment of his duties under this Decree;

l. Request and review any data or information necessary to reach decisions or resolve disputes;

m. Advise the Parties when milestones have been achieved or have not been achieved, and in the latter event, require corrective actions.

16. Proposed Treatment Strategy: Defendants have full discretion to choose the treatment strategy of their choice, including water management strategies. Provided, however, the Special Master shall review Defendants' Proposed Treatment Strategy and determine if the design or compliance approach to achieve compliance with the 300  $\mu$ S/cm conductivity threshold from Paragraph 13.b, *supra*, is consistent with

customary engineering practices and principles and is in compliance with the milestones listed in Paragraph 14.

a. Defendants bear the burdens of production and proof to the Special Master. Prior to making a determination, the Special Master must provide comments to Defendants regarding the capability of Defendants' proposed treatment solution to achieve compliance. The Special Master's comments are not binding upon Defendants. However, Defendants shall respond, and Plaintiffs may respond, to the Special Master's comments within thirty (30) days. If the Special Master determines that Defendants' Proposed Treatment Strategy constitutes a design or compliance approach consistent with customary engineering practices and principles, and is an appropriate approach to achieve the conductivity threshold of 300  $\mu\text{S}/\text{cm}$ , in accordance with the milestones listed in Paragraph 14, then the Special Master shall issue a memorandum with his opinion regarding the same. If the Special Master's opinion is that the Proposed Treatment Strategy does not meet the criteria of this subparagraph, Defendants shall submit a second Proposed Treatment Strategy within thirty (30) days. If, after completing the review, comment and response provisions of this subparagraph, the Special Master finds the second Proposed Treatment Strategy does not meet the criteria of this subparagraph, Defendants may propose a final Proposed Treatment Strategy within thirty (30) days. Upon a finding that the final Proposed Treatment Strategy does not meet the criteria of this subparagraph, the Special Master shall specify a Listed Technology for use as the Proposed Treatment Strategy. Nothing in this subparagraph affects the Final Compliance Date set forth in Paragraph 14.

b. When Defendants choose a Proposed Treatment Strategy for any outfall, they shall also supply a reasonable schedule of the activities necessary for the

expeditious design, purchase, delivery and installation of that technology by the applicable compliance dates set forth in Paragraph 14 above. This shall include at a minimum:

- i. A process design narrative describing the effluent limits which will be met.
- ii. A listing of treatment objectives applicable to the design;
- iii. The characteristics of the water to be treated;
- iv. A narrative description of the technology in sufficient detail to be reviewed by a person competent in water/wastewater treatment technologies;
- v. Process design summary tables containing selected design parameters;
- vi. A reasonably detailed GANTT chart establishing a schedule for engineering, procurement, construction and commissioning of the technology;
- vii. Any other information requested by the Special Master.

17. No Party shall communicate with the Special Master *ex parte*. Copies of all documents sent to, and notifications of any other communications with the Special Master should be sent to the opposing parties at the addresses listed in Section XIII.

18. In the event there is a change in the scientific or regulatory understanding related to the issues decided in the jurisdiction and liability phase of this case and such change is not covered by Paragraph 13.b. or 13.c. above, the Consent Decree may be reopened if both parties agree and the parties shall confer and determine if the

compliance thresholds set forth in the Section VI of this Decree (“Compliance Requirements”) are still appropriate and adjust them as appropriate.

19. Defendants shall shut down operations of the drag line excavator at the Progress Mine by December 31, 2016. Defendants shall not operate or use this particular drag line excavator in Central Appalachia after December 31, 2016. Defendants are prohibited from selling, leasing, or otherwise transferring this drag line excavator to any person who intends to use the excavator in Central Appalachia.

## **VII. MONITORING AND REPORTING REQUIREMENTS**

20. Defendants shall conduct quarterly monitoring of their discharges from each Outlet for the following parameters: sulfate, total dissolved solids, specific conductance, pH, temperature, dissolved oxygen, total suspended solids, total alkalinity, bicarbonate alkalinity, chloride, calcium, potassium, total and dissolved aluminum, total and dissolved iron, total magnesium, and total manganese. Water samples shall be collected and analyzed using U.S. EPA methods. Samples shall be representative of discharges for the respective period.

21. Defendants shall conduct Genus Level Index of Most Probable Stream Status (GLIMPSS) sampling annually between April 15 and June 1<sup>st</sup>. GLIMPSS tests shall be performed and analyzed using EPA benthic macroinvertebrate sampling protocols and the results shall identify both the family and genus of each collected organism. If WVDEP adopts and EPA approves a different SCI method than WVSCI during the term of this Decree, Defendants shall use that method as well as GLIMPSS. SCI tests shall be performed at the locations described in paragraph 13.a. GLIMPSS monitoring results obtained pursuant to this paragraph may be used as one of the samples to determine compliance with paragraph 13.a, but nothing in this paragraph affects the requirement to obtain two successive Passing GLIMPSS Scores.

22. Defendants shall report the results of their monitoring and sampling activities in paragraphs 20-21 above to Plaintiffs and the Special Master within 10 business days after receipt of those results.

23. Defendants shall monitor for conductivity at least twice monthly at the time of DMR sampling.

24. Defendants shall prepare quarterly progress reports and submit them to the Plaintiffs by the end of the month following the close of the quarter (January 31<sup>st</sup>, April 30<sup>th</sup>, July 31<sup>st</sup>, October 31<sup>st</sup>) commencing on April 30, 2015 and continuing for the term of the Consent Decree. The frequency of these progress reports can be modified upon agreement of the parties without requiring Court approval. Those reports shall also be sent to the Special Master.

25. All reports shall be submitted to the persons designated in Section XIII of this Consent Decree (“Notices”).

26. Any information provided pursuant to this Consent Decree may be used by Plaintiffs in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

### **VIII. STIPULATED PAYMENTS**

27. Defendants shall be liable for stipulated payments for violations as specified below, unless excused under Section IX (“Force Majeure”) or waived by Plaintiffs as provided in Paragraph 32.

28. If Defendants do not demonstrate compliance at all Outfalls as set forth in Section VI (“Compliance Requirements”), *supra*, Defendants shall make the following stipulated payments for each excursion of 300  $\mu$ S/cm conductivity at each Outfall:

- a. \$37,500 if a Listed technology is not used at that Outfall.
- b. \$18,750 if a Listed Technology is used at that Outfall.



In determining whether 300  $\mu\text{S}/\text{cm}$  has been exceeded the Defendants must comply with the monitoring requirements of Paragraph 23. Defendants may elect to monitor more frequently but must notify Plaintiffs of all monitoring results. Defendants shall be responsible for no more than two stipulated payments each month, which may be assessed for exceeding 300 $\mu\text{S}/\text{cm}$  either as a daily maximum or monthly average.

29. In addition to the payments listed in paragraph 28, Defendants shall be liable for a one-time stipulated payment of \$250,000 for each outfall where 1) Defendants have not achieved compliance as set forth in Section VI, and 2) Defendants have chosen not to install a Listed Technology, or 3) Defendants have chosen to install a Listed Technology but have not completed construction of that system.

30. The Parties agree that the use of Reverse Osmosis at an Outfall will be considered the use of a "Listed Technology." Other technologies may be added or deleted from the Listed Technologies and such list may be amended, as follows:

- a. By agreement of the Parties;
- b. Based upon the determination of the Special Master after the presentation of a pilot report or other data by one of the Parties; provided that, the moving party has the burden of establishing that the technology should be added to or deleted from the list, and provided that the non-moving party has an opportunity to comment on and oppose the inclusion or deletion of any technology on the list; or
- c. Based on the determination of the Special Master after one of the Parties submits a request to add or delete a technology based upon field data from installed treatment systems, and provided that the non-moving party has the opportunity to comment on and oppose

the inclusion or deletion of any technology on the list. These data may come from third party sources.

31. Defendants shall submit stipulated payments due as a result of this section at the end of the month following the conclusion of each calendar quarter (i.e. by April 30, July 31, October 31 and January 31).

a. Defendants shall make payments to the West Virginia Land Trust by certified check, bank check, or money order to the West Virginia Land Trust and shall send the funds to the following address:

West Virginia Land Trust  
P.O. Box 11823  
Charleston, WV 25339-1823

The check or money order shall reference Ohio Valley Environmental Coalition v. Elk Run Coal Company et al, Civil Action No. 3:12-cv-785. Payment shall be considered complete upon mailing or direct delivery to the specified address. A copy of the check and cover letter shall be sent to Plaintiffs at the time payment is made and shall state that payment is being made pursuant to this Decree.

b. Appendix A to this Decree describes how the Stipulated Payments in this section will support and expand the West Virginia Land Trust.

32. Plaintiffs may, in the unreviewable exercise of their discretion, reduce or waive stipulated payments otherwise due under this Decree.

33. If Defendants do not demonstrate compliance at all of the Outfalls as set forth in Section VI ("Compliance Requirements"), Plaintiffs shall not seek and Defendants shall not be subject to remedies for contempt, provided that Defendants have exercised diligence and good faith to comply with the Decree. In such event, aside from the stipulated payment(s)

described above, Plaintiffs' sole remedy for Defendants' non-compliance would be to seek further injunctive relief from the Court.

#### **IX. FORCE MAJEURE**

34. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the reasonable control of Defendants, of any entity controlled by Defendants, or of Defendants' contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendants' financial inability to perform any obligation under this Consent Decree.

35. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, Defendants shall provide notice orally or by electronic or facsimile transmission to Plaintiffs within five business (5) days of when Defendants first knew that the event might cause a delay. Within 14 days thereafter, Defendants shall provide in writing to Plaintiffs an explanation of the reasons for the delay; the anticipated duration of the delay; and actions taken or to be taken to prevent or minimize the delay.

36. If Plaintiffs agree that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by Plaintiffs for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other

obligation. Plaintiffs will notify Defendants in writing within 5 business days of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

37. If Plaintiffs do not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, Plaintiffs will notify Defendants in writing of its decision with five (5) days of its receipt of the Force Majeure claim by Defendants. Any dispute between the Parties over a Force Majeure claim may be resolved by the Special Master.

#### **X. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

38. This Consent Decree resolves the civil claims of Plaintiffs for the violations alleged in the Complaint in this action, filed on March 20, 2012, and those that occur through the date of termination of this Decree.

39. The Parties agree to the dismissal of Plaintiffs' claims regarding Outfall 001 under WV/NPDES Permit WV1019601 with prejudice as to violations through the Effective Date of this Consent Decree because the outfall has yet to be built and, thus, cannot be in violation.

40. This agreement does not represent an admission of liability by Defendants. Further, Defendants do not concede that the legal theory advanced by Plaintiffs in this case is correct and applicable at other sites. Defendants and/or their affiliate companies reserve all rights to oppose Plaintiffs' legal theory in other cases.

41. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

#### **XI. COSTS AND FEES**

42. Defendants shall pay reasonable costs and attorneys' fees, including expert witness fees and costs incurred by Plaintiffs in conjunction with this civil action through the Effective Date of this Consent Decree, in accordance with the fee-shifting provisions of the CWA

and SMCRA. The Parties have agreed that those costs and fees will not exceed \$493,967.58. Of that amount, \$399,883.15 is for Plaintiffs' reasonable attorneys' fees, allocated as follows:

- a. \$95,859 for Michael Becher's 426 hours at the reasonable rate of \$225/hour.
- b. \$76,000 for Joe Lovett's 190 hours at the reasonable rate of \$400/hour.
- c. \$213,940 for Jim Hecker's 534.85 hours at the reasonable rate of \$400/hour.
- d. \$11,909.15 for Derek Teaney's 40.37 hours at the reasonable rate of \$295 per hour.
- e. \$2,175 for Peter Morgan's 8.7 hours at a reasonable rate of \$250 per hour.

In addition to attorney fees, Plaintiffs' costs and expert expenses were \$94,084.43.

43. Not later than thirty (30) days from the entry of this Consent Decree, Defendants shall deliver to Plaintiffs' counsel a check for \$493,967.58 made payable to Appalachian Mountain Advocates. Appalachian Mountain Advocates shall be wholly responsible for the proper distribution of any portions of the delivered sum to any and all other attorneys, experts or other entities who may be entitled thereto. The sum delivered under this paragraph shall be a complete settlement of Plaintiffs' claims for costs and fees incurred up to the Effective Date of this Consent Decree, and thereafter for responding to possible comments on this Decree by the Department of Justice.

44. Defendants shall also pay Plaintiffs' reasonable fees and costs for their work related to (a) monitoring Defendants' compliance with the Decree, and (b) proceedings to interpret or enforce the terms of the Decree.

### **XIII. NOTICES**

45. Unless otherwise specified herein, whenever notifications, submissions, reports or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To Plaintiffs:

Mike Becher  
Appalachian Mountain Advocates  
P.O. Box 507  
Lewisburg, WV 24901

To Defendants:

Legal Department  
Alpha Natural Resources Services, LLC  
300 Running Right Way  
Julian, WV 25529

And

Executive Vice President & General Counsel  
Alpha Natural Resources  
One Alpha Place  
P.O. Box 16429  
Bristol, VA 24209

46. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

47. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

#### **XIV. EFFECTIVE DATE**

48. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter this Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

## **XV. RETENTION OF JURISDICTION**

49. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Section XVI (“Modification”) or effectuating or enforcing compliance with the terms of this Decree.

50. Except as provided in Paragraph 33 above, Plaintiffs and Defendants reserve all legal and equitable rights and defenses available to them to enforce or defend the provisions of this Consent Decree.

## **XVI. MODIFICATION**

51. The terms of this Consent Decree, including the attached appendices, may be modified only by a subsequent written agreement signed by all Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

## **XVII. TERMINATION**

52. The Consent Decree shall remain in effect at each Outfall until either 1) the Defendants discharge effluent with levels at or below 300  $\mu\text{S}/\text{cm}$  for six (6) consecutive months; or, 2) the Defendants achieve a Passing GLIMPSS Score pursuant to Paragraph 15(a).

## **XVIII. SIGNATORIES/SERVICE**

53. Each undersigned representative of Plaintiffs and Defendants certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

54. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

## **XIX. INTEGRATION**

55. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

## **XX. FINAL JUDGMENT**

56. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to Plaintiffs and Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

ENTER: \_\_\_\_\_, 2015

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ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE

For the Plaintiffs Ohio Valley Environmental Coalition, Inc., West Virginia Highlands  
Conservancy, Inc., and Sierra Club

/s/ Joseph M. Lovett  
JOSEPH M. LOVETT (WV Bar No. 6926)  
J. MICHAEL BECHER (WV Bar No. 10588)  
Appalachian Mountain Advocates  
P.O. Box 507  
Lewisburg, WV 24901  
304-793-9007

Dated: 12/15/2014



For the Defendants Elk Run Coal Company, Inc. and Alex Energy, Inc.

/s/ M. Shane Harvey  
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Dated: 12/15/2014